No. 9193.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

F. G. WHITE,

Appellant,

vs.

B. J. BRADNER, as Receiver for the Lake View Oil and Refining Company; A. D. MITCHELL and OIL WELL SUPPLY COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES B. J. BRADNER, AS RECEIVER, AND OIL WELL SUPPLY COMPANY, A CORPORATION.

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BRIEF FOR APPELLEES B. J. BRADNER, AS RECEIVER, AND OIL WELL SUPPLY COMPANY, A CORPORATION.

Statement of Case Giving Rise to the Present Appeal.

We feel it necessary, in order that the court may be fully informed, to make a statement of facts for the reason we consider that the statement made by appellant omits many material facts and circumstances.

The receivership action has been pending since May, 1931, and, taking appellant's own figures as set forth in his protest, there are still unpaid claims in excess of $200,000.00 [R. p. 127] out of approximately $300,000.00 general claims [R. p. 44]. In addition there is a contin-

gent joint venture interest of one John H. Fisher in the production from certain wells in an amount of approximately $78,000.00, which is subordinate to the claims of other creditors [R. p. 45], but to which the rights and interests of the corporation and its stockholders are subject.

On October 19, 1938, the Receiver filed his petition for an order authorizing him to sell five oil leases and the personal property appertaining thereto for $75,000.00 [R. pp. 69-79]. These leases constitute the major part of the receivership assets. On the same date the court made its order setting said petition for hearing on October 31, 1938, and directing written notice to be given by mail to creditors and stockholders [R. pp. 79-80]. On October 20, 1938, notice of the hearing was mailed to the creditors and stockholders, including as a stockholder Floyd G. White, the appellant herein [R. pp. 80-82]. The notice so mailed specifically referred to the fact that it was proposed to sell the leases for $75,000.00 [R. pp. 82-84].

On October 31, 1938, the petition came on for hearing, and various creditors urged that a sale be made [R. pp. 84-85]. No objection was made by appellant F. G. White, nor by anyone else [R. pp. 85, 86].

On October 31, 1938, the court made its order providing for the sale of said leases at public auction on December 10, 1938, at a sum of not less than $75,000.00 [R. pp. 86-95]; the order also provided for the publication of a notice of sale [R. p. 89]. The form of notice was approved by the court [R. pp. 95-103]. This notice of sale expressly mentioned the price of $75,000.00 [R. p. 101].

A copy of the notice of sale was mailed on November 4, 1938, to each of the creditors and stockholders, includ-

ing as a stockholder the appellant Floyd G. White [R. pp. 103-104].

As appears from the petition of the Receiver for confirmation, the public sale was held on December 10, 1938, as provided for in the prior order of court, and after publication of notice, etc., at which sale A. D. Mitchell was the highest bidder for the Pentland Lease at $48,500.00, and for the 1st ElDora (Main) Lease at $3,750.00, and for the 2nd ElDora-Smith Lease at $3,100.00, and Bishop Oil Company was the highest bidder for the Midway Field Lease at $8,200.00 and Hillman-Long, Inc., was the highest bidder for the Elk Hill Lease at $37,000 00, the aggregate bids for all five leases being $100,550.00.

It should be mentioned here that the sale of the Elk Hill Lease is no longer involved in this appeal, as the appeal has been dismissed as to said lease.

The court made its order setting the petition for confirmation for hearing on December 27, 1938 [R. pp. 118-126].

The appellant F. G. White for the first time, at the time of said hearing on December 27, 1938, filed his protest [R. pp. 126-129].

It should be noted that neither by the written protest nor the statements of counsel in presenting the same was there any suggestion that a higher bid could or would be secured but, on the contrary, the suggestion was that the receivership should be continued [R. pp. 126-129], and the suggestion was made that the Receiver should use the $50,000.00 cash which he had on hand and $150,000.00 more (which presumably would have to be borrowed) to deepen the wells on the property [R. p. 169].

It appeared at the hearing that the creditors were in favor of a sale of the assets at that time to the highest bidders [R. pp. 163-166].

It appeared at the hearing that an appraisement had been made approximately a year before, showing the value of the property to be approximately $150,000.00.

The offer of proof made included the offer of testimony

> "that if the Receiver would use $150,000 with $50,000 he now has on hand to deepen his present wells, within a very short time he would have sufficient profits from the wells on the Pentland Lease alone to pay all of the creditors, and that after the creditors were paid the stockholders would receive back their company intact" [R. p. 169].

It should also be noted that the testimony offered was such as could obviously amount to no more than the opinion of a petroleum engineer based on the alleged discovery of deeper sands on other properties, and without even an offer to show that any production had been secured from said alleged deeper sands [R. p. 169].

As bearing upon the reasons which motivated the court in refusing the offered testimony, the following from the record of the proceedings should be noted:

> "Mr. Rifkind: May it please the court, I represent the Oil Well Supply Company, a creditor to the extent of some $15,000 to $20,000—I do not remember the exact amount—and we are in favor of the confirmation of the sale as returned, or any better offer that can be obtained in price here today.
>
> "In connection with the matter, let me state that a receiver was appointed for the Lake View Oil and Refining Company in March, 1931. In other words,

this property has been *in custodia legis* for approximately eight years. It seems to me that the first and foremost consideration is that of the creditors; secondarily, that of the stockholders.

"This court, approximately a year ago, appointed three competent appraisers to make an appraisement of this property, and an appraisement was made showing the value of this property to be approximately $150,000. On July 27th of this year a meeting was held at the Bank of America National Trust and Savings Association at which there was then and there present an overwhelming majority of creditors, and I would say an overwhelming number of creditors. In other words, I am definite that the creditors then and there represented would be around 80 to 90 per cent of the creditors; and I am also satisfied there was a majority in number present, too. I have here the assistant vice-president of the Bank of America who may be able to enlighten us as to that if that becomes necessary. At that particular time it was the unanimous opinion of all the creditors there and then assembled—and I want to say that some of the men who were present were not only creditors but experienced business men and experienced oil men. For instance, we had a representative there of the Union Oil Company; we had a representative of the O. C. Fields Gasoline Company; we had a representative there of Oil Well Supply Company; we had a representative of the Republic Supply Company; we had representatives of the Bank of America, and other men—yes; representatives of the Taft Well Drilling Company, and other representatives of that type, and they unanimously were in favor of the immediate liquidation, immediate sale of the property in this receivership so that it be converted into cash and dividends be paid to the creditors.

"We are not interested in speculation; we are not interested in potential profits. I suppose any buyer who makes a bid figures that, but we can't go on indefinitely. We have had more than a reasonable opportunity for this thing to work itself out in the natural course of events, and surely the time has come when this receivership should be liquidated.

"Your Honor will further recall that that meeting appointed a committee consisting of Clarence Hanson, attorney for the Bank of America; myself, as attorney for the Oil Well Supply Company, and Adolph Ramish, representing himself; a committee of creditors called upon Your Honor shortly after July 20, 1938, and conveyed to Your Honor that it was the concensus of opinion of the creditors of this estate that the assets be liquidated and sold as soon as possible, and requested Your Honor to direct and instruct the Receiver accordingly. Pursuant to that the Receiver did get busy, advertised it and a sale as been effected, and unless there is a higher and better bidder for cash today, we recommend that the sale be confirmed.

"We do not feel that the protest is in order. If there are any higher bids, let them come forward, let them produce higher bidders. But merely because they may say there is some future or potential possibility, I do not think it should enter into the case" [R. pp. 163-166].

* * * * * * * * *

"The Court: Why have not these stockholders who now appear to oppose the liquidation, after all these years from 1931—why haven't they gathered together some good buyer who would raise this price

if it is so valuable; I will say that I have determined not to carry on this receivership any longer. It has been here too long. I would not do it" [R. p. 166].

"Mr. Wilson: May we offer testimony, Your Honor, as to the value of the property of the Pentland Lease?

"The Court: If you wish to make a point of it I will allow you to make your offer and have an exception to it. But it is not going to change my mind at the present time because these things have been advertised; we have had meetings and hearings; we have had reports of the Receiver, and everybody has had a chance to tell us anything that there was to be told, and it was finally, after carrying on and carrying on a long time, determined this Receiver cannot maintain that management profitably. To be sure, there is a little profit shown but I will venture to say he will tell you that he has not charged a cent of depreciation against it. And where are you?

"No. 2: There is no Receiver who, for a great length of time, can properly operate an oil producing property for the reason that, as the years go by, development is needed to keep up the profit and quantity. No creditor nor group of creditors would come in here and attempt to prove before the court that the borrowing of $100,000 to put down an oil well was profitable; neither would the court order it. So the natural progress is that they depreciate and depreciate, and you have not only a sample of it in this case—striking in this case—but in other cases" [R. p. 167].

* * * * * * * * *

> "Mr. Dechter: I would like to call your attention to the fact that the record shows that Your Honor ordered this sale to be made at public auction at Bakersfield, Kern County, the county in which the property is located, that in the order thus made, in the notice to creditors, notice to the public and the advertisements, it was definitely stipulated that this court would accept a bid of $75,000 if no better bid was received. No objection was made to that procedure being taken. I think the motion should have been made before the Receiver had gone to the expense of a sale advertisement and before the court had made the order. A stockholder at that time could have asked for an order limiting the sale to a certain amount. It seems to me that the protest and motion to vacate the sale comes too late at the present time" [R. p. 168].

It should be noted that neither in the protest, statement of counsel presenting the same, nor in this appeal is there any claim or suggestion of any irregularity in the holding of the sale. Nor is there any claim or suggestion of any misrepresentation, fraud, bad faith, or any circumstance which prevented the sale from being fair and open and productive of the highest bids obtainable. The sale was a public one, and conducted as a public auction, and was noticed and conducted in strict conformity with the court's previous order. Neither the protestant F. G. White, appellant herein, nor anyone else made a higher bid than $48,500.00 for the Pentland Lease, with respect to which

appellant makes his main contention. Furthermore, as hereinbefore pointed out, neither F. G. White nor his counsel has at any time suggested that any higher bid could be secured.

We thus have a situation, at the time of the hearing for confirmation, of a receivership which had existed for over eight years; where a large sum in claims of general creditors still remained unpaid; wherein the court had previously made its order after notice to F. G. White, the appellant herein, for the sale of the leases for a sum not less than $75,000.00; where no objection had been made by said F. G. White, although he was fully advised that the petition sought an order for the sale of the properties for $75,000.00; where sale was had at public auction to the highest bidder in strict conformity with the orders of the court, and where at the time of the hearing for confirmation said F. G. White for the first time filed his protest contending in effect that the receivership should be further continued and that money should be borrowed for drilling operations. The testimony offered was merely that of one man's opinion. There was absolutely no suggestion and has been none of any irregularity, fraud, misrepresentation, or bad faith. No contention has been made that any higher or better bid could be secured for the properties.

The sole question is whether under these circumstances there was any error in the court's refusal to hear the offered testimony and in confirming the sale.

ARGUMENT.

I.

The Sale of the Assets Was Not for a Grossly Inadequate Consideration, and the Circumstances Were Not Such That the Sale Should Be set Aside.

Under the first point in appellant's brief it is contended in effect that the record shows that the sale was for a grossly inadequate consideration and that therefore the sale should be set aside. This point is based on appellant's contention that because the offer of proof was refused it must be considered as established that the Pentland Lease had a value of $2,000,000.00.

We have no quarrel with the authorities stating the general rule to the effect that a sale may be set aside where the price is so grossly inadequate as to shock the conscience of the court, and as most of the cases say, so gross as to raise a presumption of fraud, unfairness, or mistake. However, the record here does not show any such gross inadequacy of price. The fact is that the evidence offered by F. G. White was not admitted by the court, and therefore such evidence is not in the record. If the court erred in refusing to admit the testimony, the error claimed should be of the court's refusal to admit the testimony, rather than a claim that the record shows that it was established that the price was grossly inadequate.

Appellant refers to certain language from the case of *Griffith v. Venzinger* (Md.), 125 A. 512. That case was tried by a jury, and the lower court refused to permit certain offered testimony. On appeal the upper court was considering the propriety of the rulings of the lower court on these matters of evidence. The upper court held that the matters offered to be proved were material and should have been allowed for the consideration of the jury. It is

true that the court used the language quoted in appellant's brief. However, it is also true that in 125 A., at page 519, the court said:

> "Such facts had not, it is true, any conclusive force, but they did have some weight, and the caveators were entitled to have them considered by the jury."

In the case of *Norfolk etc. Railroad Co. v. Fort Dearborn Co.,* 280 Fed. 264, also cited in appellant's brief, objections were sustained to certain questions in an action for damages for the conversion of personal property. A verdict was directed based on certain stipulated facts. On appeal it was held that the case had been tried on an erroneous theory of the measure of damages applicable, and that the appellant was entitled to another day in court, and that the objections had been improperly sustained.

It is quite clear that the authorities cited in appellant's brief do not sustain the rule contended for by appellant, namely, that because the offered evidence is refused that therefore the facts intended to be testified to must be deemed established. Obviously, testimony which is offered and refused could have no greater effect than the testimony would have if admitted. All that the cases cited by appellant hold is that, *for the purpose of determining whether or not the ruling of the lower court in excluding evidence was proper,* it must be assumed that the witness would give the testimony offered. In other words, in order for a determination to be made as to whether certain offered testimony is relevant or material, it is necessary to assume that the witness, if permitted to do so, would give the expected testimony. The testimony itself might have little weight, and certainly might not be conclusive.

The fact is that the testimony offered in this case was such as to amount only to the speculative opinion of the

witness—not only on the question of whether there were deeper sands under the Pentland Lease and as to the reserve value of that lease, but also on the question of whether the use of a large sum of money to deepen existing wells would result in future profits [R. p. 169].

On the other hand, the court had before it other circumstances which constituted much better evidence as to the value of the property. We refer to the fact that a sale, after full notice and publication, had been held at public auction where open and competitive bidding, free from any circumstances of unfairness or fraud, could give the best indications as to the value of the property and what it could be expected to bring at sale.

In *Keyser v. Federal Loan Bank* (1937) (Va.), 193 S. E. 489, the court had under consideration the matter of a sale in a mortgage foreclosure case ordered to be made by certain commissioners. The property was struck off to the highest bidder, and the sale came on for confirmation by the lower court. It was claimed that the bid at the sale was grossly inadequate. In the course of its opinion the upper court quoted from *R. C. L.*, Vol. 16, Sec. 7, p. 95, as follows (193 S. E. 491):

> "A judicial sale regularly made in the manner prescribed by law, upon due notice, and without fraud, unfairness, surprise, or mistake, will not generally be set aside or refused confirmation on account of mere inadequacy of price, however great, unless the inadequacy is so gross as to shock the conscience and raise a presumption of fraud, unfairness, or mistake. . . . And a sale conducted with fairness and regularity should not be set aside for gross inadequacy of price upon conflicting evidence as to whether it sold at or above the fair market value, even though an advance bid is subsequently made of one-fourth over the price at which the property was knocked down."

Continuing, the court said in 193 S. E. at 491:

> "There has been no suggestion in the case at bar that any fraud, mistake, or unfair dealing has taken place with reference to the sale. The sole objection to the confirmation is that the bid of the appellant is so grossly inadequate that it shocks the conscience of the court. Where the sale is tainted with fraud, mistake, or misconduct, and has worked an injustice to the party complaining, the controlling rule in determining whether the sale should be set aside is different from the rule to be applied where none of these elements exists, and the sole reliance for objection to confirmation is inadequacy of price, as is the case here."

The court then sets forth language quoted in *Benet v. Ford* (Va.), 74 S. E. 394, 397, as follows (193 S. E. at 491):

> "The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of undervalue, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results."

We suggest that in this case, where there was no claim of any irregularity, unfairness, or fraud, and where a sale was had at public auction, giving full opportunity for open and competitive bidding, that the results of that auction constitute far better evidence of the value of the leases than the speculative opinion evidence offered by appellant—and especially where it clearly appears that protestant was not claiming that any higher price could be obtained at any sale but, on the contrary, was seeking a continuation of the receivership.

II.

Where Order of Sale Fixed a Minimum Price and Was Made After Notice to and Without Objection from F. G. White, There Was No Error in Court's Refusal to Hear or Consider Testimony Offered in Support of Protest to Confirmation, Where Protest Was Not on the Ground of Irregularity in Sale or Noncompliance With Order of Sale, but Was in Reality a Plea That the Receivership Be Continued.

Under the second point in appellant's brief, it is contended in effect that the court failed and refused to exercise its discretion, and that appellant was denied his legal rights to require the court to entertain the question on its merits.

We think the fallacy in appellant's argument rests in appellant's assumption that in order for the court to exercise its discretion the court should have admitted and considered the testimony offered. In other words, appellant in effect considers that the only place for the operation of the court's discretion was after hearing the evidence offered.

We suggest that there was another point in the proceedings at which the court could and did very properly exercise its discretion. In other words, we think the court had the discretionary right, under the circumstances of this case, to refuse to consider the protest at all.

At the risk of being considered repetitious, we feel that we must again call attention to the fact that, prior to the hearing for confirmation of sale, the court had made an order of sale after full notice to F. G. White and without any objection from him. Before the order was made, F. G.

White was fully advised that it was contemplated that a sale would be ordered for a minimum price of $75,000.00. He did not object to the proposed order, and in the absence of such objection the court ordered the sale to be held at public auction on December 10. The sale was so held, and aggregate bids in excess of $100,000.00 were received. Having failed to object to the proposed order of sale or to the minimum price of $75,000.00 therein provided, we suggest that, under all the circumstances of this case, the court had full discretion to refuse to consider a protest and objection first made at the hearing for confirmation, where the protest and objection was not based on any claimed irregularity in the sale or noncompliance with the order, and especially where the protestant did not claim that any higher or better bid could be secured.

We of course realize that there may be circumstances of unfairness or fraud or collusion by which open and competitive bidding at a sale might result in a lower bid than that justified by the real value of the property. Under such circumstances the court might very properly consider a protest. But no such circumstances exist in this case.

It is quite obvious from a reading of the written protest, and from the statements of counsel in presenting the same, and from the testimony offered, that what F. G. White was really trying to do at the hearing for confirmation was to oppose a liquidation of the receivership estate and to advocate a continuation. If he had any good reason to suggest to the court why the assets should not be sold, or why the minimum price of $75,000.00 was not a proper minimum price to be set forth in the order of sale, he should have appeared in court and stated his objections to the making of the order of sale. Having failed to do so,

with no reason shown for his failure, the court was entirely within its discretionary rights in refusing to consider his later protest.

The very purpose of giving notice to the creditors and stockholders of the contemplated order for sale was to permit them to advise the court as to the matter. To permit persons to later come in, as F. G. White attempted to do here, would be to render meaningless the procedure here followed by the court in giving an opportunity for any person objecting to liquidation to be heard.

In *Clark on Receivers* (2d Ed.), Vol. 1, p. 699, the following is stated (italics ours):

> "The purpose of the law is that the sale should be final and to insure this, it is essential that no sale be set aside for trivial reasons, *or on account of matters which ought to have been attended to by the complaining party prior thereto.*"

See, also:

> *Pewabic Mining Company v. Mason,* 145 U. S. 349, at 356.

In 35 *C. J.,* at p. 46, the following is stated:

> "Where a party knows of any fact that might constitute an objection to the legality of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

Conclusion.

The court, after full notice and hearing, determined that the assets of this eight-year-old receivership should be liquidated and ordered a sale. No objection was made by F. G. White, the appellant here, although he had notice and full opportunity to be heard.

A sale at public auction was conducted in full conformity with the order of court and bids in excess of the minimum price set were secured. The nature of the protest sought to be made at the time of hearing for confirmation was such that the court in the exercise of its discretion was fully justified in refusing to hear the testimony offered thereon. The court was not obliged at such late date and under all the circumstances here present to reconsider its decision that the assets should be sold. The court was not obliged at such late date and under all the circumstances here to consider the suggestion of F. G. White that the receivership should be continued. The testimony offered was not such as would have led to any other conclusion by the court than that the sales should be confirmed.

We respectfully submit that the order confirming the sales should be affirmed.

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